Supreme Court, U. S.
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Supreme Court of The United States

No. 79-1441

OCTOBER TERM 1979

CLYDE M. FORAKER, III,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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TABLE OF CONTENTS

OPINIONS BELOW. 1

JURISDICTIONAL STATEMENT 1

QUESTION PRESENTED. 2

WHETHER THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A STATE CRIMINAL JUDGE WHO HAS OVERRULED A DEFENDANT'S PRETRIAL CONSTITUTIONAL CHALLENGE TO CERTAIN OF THE STATE'S EVIDENCE TO ADVISE SUCH DEFENDANT AT THE TIME HE SUBSEQUENTLY TENDERS A PLEA OF GUILTY THAT SUCH PLEA CONSTITUTES A WAIVER OF HIS PRETRIAL CONSTITUTIONAL CLAIMS.

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE. 2

ARGUMENT. 5

CERTIFICATE OF SERVICE. 7

APPENDIX 8

Opinion, Case No. CA-2612 & CA-2613, *State of Ohio v. Clyde M. Foraker, III*, (Court of Appeals, Licking County, Ohio, July 6, 1979) 8

Entry, Case No. 79-1215, *State of Ohio v. Clyde M. Foraker, III*, (Ohio Supreme Court, October 19, 1979) 13

Entry, Case No. 79-1215, *State of Ohio v. Clyde M. Foraker, III*, (Ohio Supreme Court, October 19, 1979) 14

Order Extending Time To File Petition For Writ Of Certiorari, *Clyde M. Foraker, III, v. Ohio*, (Supreme Court of the United States, Docket No. A-586, January 8, 1980).....15

TABLE OF AUTHORITIES

Boykin v. Alabama, 395 U.S. 238 (1969) 3,4,6

Duncan v. Louisiana, 391 U.S. 145 (1968) 6

Malloy v. Hogan, 378 U.S. 1 (1964) 6

McMann v. Richardson, 397 U.S. 759 (1970) 6

Pointer v. Texas, 380 U.S. 400 (1965) 6

United States v. Jackson, 390 U.S. 570 (1968).....6

Washington v. Texas, 388 U.S. 14 (1967) 6

In re *Winship*, 397 U.S. 358 (1970).....6

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution, Section 1 2

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OCTOBER TERM 1979

No.

CLYDE FORAKER, III,

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STATE OF OHIO,

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PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

OPINIONS BELOW

The opinion of the Court of Appeals for Licking County, Ohio, Fifth Appellate District, in Case No. CA-2612 & CA-2613 is unreported (Appendix, page 8).

JURISDICTIONAL STATEMENT

On October 19, 1979, the Ohio Supreme Court dismissed Petitioner's appeal as of right from the Court of Appeals for Licking County for the reason that it found no substantial constitutional question to exist therein. (Appendix, page 13).

On January 8, 1980, an Order Extending Time To File Petition for Writ Of Certiorari was signed by Potter Stewart, Associate Justice of the Supreme Court of the United States, extending the time for filing a petition for writ of certiorari in this matter to and including

March 17, 1980. (Appendix, page 15).

QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A STATE CRIMINAL JUDGE WHO HAS OVERRULED A DEFENDANT'S PRETRIAL CONSTITUTIONAL CHALLENGE TO CERTAIN OF THE STATE'S EVIDENCE TO ADVISE SUCH DEFENDANT AT THE TIME HE SUBSEQUENTLY TENDERS A PLEA OF GUILTY THAT SUCH PLEA CONSTITUTES A WAIVER OF HIS PRETRIAL CONSTITUTIONAL CLAIMS.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 16, 1978, Petitioner was arrested and charged with operating a motor vehicle while under the influence of alcohol. On May 22, 1978, Petitioner's retained counsel entered a plea of not guilty.

On May 24, 1978, while Petitioner was at the court-

house at his counsel's request for the single expressed purpose of becoming familiar with its geographical location Petitioner initialed a "Rights In Court" form indicating he had read and understood the rights and various pleas described therein.

On May 26, 1978, Petitioner's counsel challenged Petitioner's arrest and virtually all of the state's evidence as the fruit of an illegal arrest in violation of petitioner's rights under the United States Constitution. This pretrial motion was overruled by the court on June 21, 1978.

On August 8, 1978, Petitioner was arrested a second time and again charged with operating a motor vehicle while under the influence of alcohol. A not guilty plea was also entered in this case by Petitioner's counsel, on August 16, 1978.

On September 21, 1978, the May 16, 1978, charge came on for trial and Petitioner changed his plea from not guilty to guilty. At that time he was also allowed to change his plea from not guilty to guilty to the August 8, 1978, charge which was scheduled to come on for trial on September 27, 1978. At no time during the September 21, 1978, proceeding did the court or Petitioner's counsel mention Petitioner's federal constitutional rights, including those raised by his pretrial motion, or the fact that such rights were waived by his change of pleas. At no time during these proceedings did anyone inquire if Petitioner admitted the acts charged.

Prior to sentencing, Petitioner retained new counsel who filed a Motion To Withdraw Guilty Pleas citing Boykin v. Alabama, 395 U.S. 238 (1969) and asserting that Petitioner was not aware and had not been advised by the court that his pleas of guilty waived his right to maintain his pretrial federal constitutional claims.

At the hearing on Petitioner's Motion To Withdraw Guilty Pleas the prosecutor acknowledged that the court was required to advise Petitioner of his rights

under the United States Constitution, excused himself and left the courtroom. After the prosecutor left, the judge lectured Petitioner's new counsel on what an outstanding lawyer Petitioner's prior counsel was concluding with the revealing observation "I am sure that Mr. Spahr[1] fully advised Mr. Foraker of all of his rights prior to the change of plea." (Transcript of January 31, 1979, proceedings, page 9.) Petitioner's Motion To Withdraw Guilty Pleas was overruled and sentence was imposed.

The Petitioner appealed his convictions to the Court of Appeals for Licking County, Ohio and pressed his argument that he had not been advised that his guilty pleas waived his pretrial federal constitutional claims. Boykin v. Alabama 395 U.S. 238 (1969) was again cited, and, although the Court of Appeals opinion made reference to Petitioner's contention[2], it affirmed the trial court without addressing the argument.

Petitioner appealed to the Ohio Supreme Court which dismissed the appeal as involving no substantial constitutional question.

This Petition followed.

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[1]Jon R. Spahr was Petitioner's first counsel.

[2]Appendix, page 11.

ARGUMENT

At no time during these proceedings has Petitioner knowingly waived his right to challenge the constitutional admissibility of the state's evidence against him. On the contrary, he has precluded any inference of waiver by filing a timely pretrial motion challenging the admissibility of the state's evidence. [3] It was not until after he

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[3]Rule 12, Ohio Rules of Criminal Procedure, in pertinent part, provides:

(A) * * *

(B) Any * * * objection * * * which is capable of determination without trial of the general issue may be raised before trial by motion. The following must be raised before trial:

(1) * * *

(2) * * *

(3) Motion to suppress evidence * * * on the ground that it was illegally obtained;

(4) * * *

(5) * * *

(C) * * *

(D) * * *

(1) * * *

(2) * * *

(E) * * *

(F) * * *

(G) Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial * * * shall constitute waiver thereof * * *

(H) * * *

(I) * * *

(J) * * *

had retained new counsel after pleading guilty that he learned that his guilty pleas constituted a waiver of his constitutional challenge to the admissibility of the state's evidence against him.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a state criminal defendant be made aware that his guilty plea constitutes a waiver of his rights not to plead guilty, United States v. Jackson, 390 U.S. 570 (1968), to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968), to confrontation of his accusers, Pointer v. Texas, 380 U.S. 400, to present witnesses in his own defense, Washington v. Texas, 388 U.S. 14 (1967), to remain silent, Malloy v. Hogan, 378 U.S. 1 (1964), to be convicted only by proof beyond all reasonable doubt, In re Winship, 397 U.S. 358 (1970), and to contest the constitutional admissibility of the state's evidence against him. McMann v. Richardson, 397 U.S. 759, 766 (1970). It also requires the judge who accepts the guilty plea advise the defendant on the record of the rights which are waived by his guilty plea in order to establish a record which leaves no doubt that the plea is an intentional relinquishment of known rights. Boykin v. Alabama, 395 U.S. 238 (1969).

Petitioner believes that he has presented a substantial federal constitutional question which although it has not been specifically determined by this court heretofore was probably not decided by the Ohio courts in accord with the decisions of this court. Therefore, this court should grant this petition for certiorari and reverse.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to Michael Radabaugh, Assistant Law Director of the City of Newark, Ohio, Counsel for Respondent, on March , 1980. I hereby certify that all persons required to be served have been served.

STEPHEN E. SCHAFER
Counsel for Petitioner

APPENDIX

**IN THE COURT OF APPEALS
FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

HON. JUDGE NORMAN J. PUTMAN, P.J.
HON. JUDGE DAVID D. DOWD, JR., J.
HON. ROBERT E. COOK, J.
Eleventh Appellate District
Sitting by Assignment

STATE OF OHIO
Plaintiff-Appellee

vs.

CLYDE M. FORAKER, III,
Defendant-Appellant

OPINION

CASE NO. CA-2612 & CA-2613

DOWD, J.

These two appeals involve separate convictions for driving under the influence of alcohol in violation of R.C. 4511.19.

The first conviction involves an alleged offense committed on May 16, 1978 in Granville Township, and the second conviction involves an alleged offense committed in Bowling Green Township on August 8, 1978.

Both Complaints were filed in the Licking County Municipal Court. The May, 1978 Complaint was filed in Case No. 78-TR-C-3329, and the appeal is before this Court in our Case No. CA-2613.

The August, 1978 Complaint was filed in Case No. 78-TR-C-6236, and the appeal is before this Court in our Case No. CA-2612.

After the defendant was arrested in May of 1978, he filed a motion to suppress the results of an intoxilyzer test on the ground that the intoxilyzer test followed his illegal arrest. The motion to suppress was overruled on June 21, 1978. On August 2, 1978, the May, 1978 Complaint was scheduled for a jury trial on September 21, 1978.

On August 8, 1978, the defendant was arrested for a second time on a charge of driving under the influence.

The defendant appeared in court on September 21, 1978, the date set for the jury trial with respect to the May, 1978 Complaint, and entered pleas of guilty to both Complaints. Sentencing was deferred. Eventually, both cases were set for sentencing on December 27, 1978. The defendant did not appear. A bench warrant was issued and the defendant was arrested.

The defendant's original trial counsel who represented him at the time he entered the guilty pleas on September 21, 1978, was permitted to withdraw on January 8, 1979, and new counsel was employed.

Eventually both cases were scheduled for sentencing on January 31, 1979, at which time the defendant appeared, and, through counsel, filed a motion to withdraw both guilty pleas. The motions were overruled and the defendant was sentenced in each case, and it is from those sentences that the defendant now appeals to this court claiming by his two Assignments of Error as follows:

FIRST ASSIGNMENT OF ERROR

"Where a pre-trial motion is filed by the defendant and where such motion requires a factual determination by the court, it is error for the court to ignore Rule 11(E) of the Ohio Rules of Criminal Procedure and fail to state its essential findings on the record."

SECOND ASSIGNMENT OF ERROR

"The trial court erred in refusing to sustain defendant's motion to withdraw guilty pleas which were made prior to sentencing."

I.

The first Assignment of Error applies only to the May, 1978, Complaint as the motion to suppress was directed only to that arrest. We hold that the defendant, having pleaded guilty to the May 16, 1978 Complaint cannot now contend that the trial court erred in overruling the pre-trial motion to suppress. Criminal Rule 12(H) provides that where a defendant pleads no contest, he may assert upon appeal that the trial court prejudicially erred in ruling on a pre-trial motion, including a pre-trial motion to suppress evidence. However, where a defendant pleads guilty, he has no standing upon appeal to contest an adverse ruling on a pre-trial motion to suppress. The first Assignment of Error is overruled.

II.

The motion to withdraw the guilty pleas claimed first that the defendant "had been suffering under a medical disability" causing him "misconception" of the nature of the charges brought against him, and as to

the effect of the pleas of guilty to the charges. Secondly, the defendant claimed, in the memorandum in support of the motion to vacate the pleas, that he did not realize that he was entitled to a separate jury trial on the two pending cases when he entered his guilty pleas on September 21, 1978. Finally, the defendant claimed that he was not aware or advised by the court in receiving the guilty pleas that by such action he waived his right to have an appellate review of the proceedings.

The record before this court on appeal includes the defendant's initial arraignment following the May arrest during which time the trial court provided a rather elaborate explanation with respect to the defendant's rights where charged with a misdemeanor and the effect of the various pleas. (See Crim. Rule 11(E)). The record also demonstrates that the defendant was represented by counsel at that original arraignment.

Secondly, the record on appeal includes a transcript of proceedings for the guilty pleas taken on September 21, 1978. The transcript reflects that a jury panel had been summoned for the requested jury trial with respect to the May, 1978, charge, and was released only after the defendant changed his plea, and, upon the representation of his counsel, that he had talked at length with the defendant about the effect of changing his plea of not guilty to guilty.

With respect to the memorandum in support of the motion to vacate the guilty pleas, no affidavits of the defendant were attached and no attempt was made to offer testimony in support of the motion.

In view of all of the foregoing, we find no error committed on the part of the trial court in refusing to permit the defendant to withdraw his guilty pleas on January 31, 1979, then more than four months after the guilty pleas had been entered, and after the defendant had been arrested for failure to appear for sentencing in De-

cember of 1978. We find no violation of Criminal Rule 11. The trial court remarked in overruling the motions to withdraw the guilty pleas that the motion appeared to be another effort in stalling the proceedings. We agree. The second Assignment of Error is overruled.

Both Assignments of Error having been overruled, the judgments of the Licking County Municipal Court in Cases No. 78-TR-C-3329 and 78—TR-C-6236 are each affirmed, and these casues are remanded to the Licking County Municipal Court for execution of sentence.

Putman, P.J. and
Cook, J., concur

/s/ David D. Dowd
/s/ Norman J. Putman
/s/ Robert E. Cook
JUDGES

THE SUPREME COURT OF OHIO

1979 TERM

OCTOBER 19, 1979
CASE NO. 79-1215

State of Ohio

Appellee,

vs

Clyde M. Foraker, III,

Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR LICKING COUNTY

This cause, here on appeal as of right from the Court of Appeals for Licking County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Licking County for entry.

THE SUPREME COURT OF OHIO

1979 TERM

OCTOBER 19, 1979
CASE NO. 79-1215

State of Ohio,

Appellee,

vs

Clyde M. Foraker, III,

Appellant.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS FOR LICKING COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

SUPREME COURT OF THE UNITED STATES

NO. A-586

CLYDE M. FORAKER, III,
Petitioner,

v.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 17, 1980.

/s/ Potter Stewart
Associate Justice of the
Supreme Court of the
United States

Dated this 8th
day of January, 1980